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Cross-Disciplinary Perspectives on Impact, Legitimacy and Effectiveness in the Context of EU Counter-Terrorism

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SECILE: Securing Europe through Counter-Terrorism – Impact, Legitimacy & Effectiveness

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1. Introduction

This report forms part of Work Package 3 of SECILE (Securing Europe through Counter-Terrorism: Impact, Legitimacy and Effectiveness), a collaborative project part-funded by the European Commission and led by Professor Fiona de Londras at Durham University (UK). This report draws on the findings of four state of the art reports already prepared for this work package which, respectively, consider societal, legal, democratic and operational perspectives. The cross-disciplinary report supplements the perspectives presented in these reports by reference to the outputs of Work Package 2 (on the scope and content of EU counter-terrorism measures) prepared by Ben Hayes and Chris Jones of Statewatch,¹ as well additional desk research.

The primary objective of this report is to use expensive literature reviews to identify key characteristics of ‘impact’, ‘legitimacy’ and ‘effectiveness’ as understood across these disciplinary fields in the context of counter-terrorism. The report thus brings together these perspectives to present a cross-disciplinary conceptualisation of impact, legitimacy and effectiveness in the counter-terrorist context. This conceptualisation, which is based solely on desk research, will then be synthesised with—and adjusted in the light of—empirically informed conceptualisations drawn from three case studies carried out in Work Package 4 of SECILE, undertaken by King’s College London, the Peace Research Institute Oslo, and Durham University, and semi-structured interviews with key stakeholders undertaken by the University of Durham. These case studies, which consider the disruption of terrorist financing, the use of the European Arrest Warrant for counter-terrorism, and border surveillance with a particular focus on data systems and sharing information, are informed by both semi-structured interviews with key stakeholders in the EU counter-terrorist field and focus groups with operational actors and civil society.

¹ Ben Hayes & Chris Jones, *Report on how the EU assesses the impact, legitimacy and effectiveness of its counter- terrorism laws* (SECILE Consortium, 2013) <<http://secile.eu/eu-assess-counter-terrorism-law>>; Ben Hayes & Chris Jones, *Report on the transposition of EU counter-terrorism measures* (SECILE Consortium, 2013) <<http://secile.eu/report-transposition-eu-counter-terrorism-measures>>; Ben Hayes & Chris Jones, *Catalogue of EU Counter-Terrorism Measures Adopted since 11 September 2001* <<http://secile.eu/catalogue-eu-counter-terrorism-measures>>; Chris Jones & Ben Hayes, *The EU Data Retention Directive: a case study in the legitimacy and effectiveness of EU counter-terrorism policy* (SECILE Consortium, 2013) < <http://secile.eu/data-retention-in-europe-case-study>>

2. Impact

Impact can be generally understood as ‘the effective action of one thing or person upon another’.² However, this general definition is unhelpfully vague as regards understanding both the meaning and the mechanisms of measuring the impact of counter-terrorist measures. This is because the general definition defines neither the referent nor the means of measurement. Since 11 September 2001, 239 legal and operational measures have been introduced as part of the EU’s counter-terrorism package and within these measures, as outlined in the WP2 report on *Report on How the EU Assesses the Impact, Legitimacy and Effectiveness of its Counter-Terrorism Laws*, the question of impact is rarely and incompletely addressed *ex post facto*.³ This is not least because compliance and impact are not synonymous, although compliance can both *be* an impact and *cause* impacts. Thus, merely measuring rates of compliance is not sufficient as a means of measuring impact.

2.1 Societal Impact

In his report on societal impact, Méderic Martin-Mazé surveys a vast literature on societal security to conceptualise the concept of impact.⁴ He defines impact in a general sense as being ‘the effect yielded by a specific measure’,⁵ emphasising that in understanding such effects one must be cognisant of the unevenness of impact across both societal groups and societal values. This general concept of impact makes it clear that a comprehensive understanding of a measure’s societal impact requires a multi-layered approach that identifies and takes into account its effects across a number of different referents. Security measures have uneven impact; while they may have ‘value-added in one specific societal sector’ they can ‘concomitantly yield detrimental impact in another segment’.⁶ Thus different societal groups can experience security measures differently, with what Hillyard calls ‘suspect communities’ being likely to feel particular effects from these measures that others, who are not thus identified, might not experience.⁷ Indeed, the same measures might render a negative impact for one group and a positive impact for another. The first important referent from the perspective of societal impact, then, is *who* is experiencing the effect.

A second referent identified from the societal perspective is that of societal values. Here, again, the impact may appear different depending on which societal value is taken as the referent. A measure might, for example, be identified as increasing security (or as having a positive impact from a security perspective) but increasing levels of state surveillance (or as having a negative impact from a privacy perspective). This emphasises that in order for a measure’s societal impact to be appreciated a second referent must be taken into account: *what* is being affected (from the perspective of societal values).

Measuring societal impact is, thus, a complex matter that requires an appreciation of the effects of the counter-terrorism measure on both a range of societal groups and all relevant societal values. As noted in the societal report, the societal impact (whether positive or negative) of proposed counter-terrorist measures is rarely discussed in depth at the time of adopting this measure. This is reinforced by the study undertaken by Hayes and Jones in their *Report on How the EU Assesses the Impact, Legitimacy and Effectiveness of its Counter-Terrorism Laws*.⁸ The report examines the use of pre-legislative or ex-ante assessments, assessments in the form of reports or opinions produced during the decision-making process, ‘substantive reviews’ focusing on thematic areas of EU counter-terrorism policy including those conducted by the EU member states (the ‘peer review’ mechanism) and EU bodies and post-legislative or ex-post

² *Oxford English Dictionary* (2nd edn, 1991) vol. VII, pp. 694-695.

³ Ben Hayes and Chris Jones, *supra* note 1. Impact assessments are done in the European Commission for proposed legal and other changes. An outline of the working of the impact assessment system available in European Commission, *Impact Assessment Guidelines*, (European Commission, 2009) http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf

⁴ Méderic Martin- Mazé, *Report on Societal Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context* (SECILE Consortium, 2013) < <http://secile.eu/societal-perspectives> >

⁵ *Ibid*, p. 5.

⁶ *Ibid*, p. 5.

⁷ Paddy Hillyard (1993) *Suspect Community* (London, Pluto Press).

⁸ Ben Hayes and Chris Jones, *supra* note 1.

assessments. In addition, where impact assessments are carried out *ex post facto* they tend to be carried out on an ad hoc basis.

2.2 Legal Impact

In their report on the legal perspective, Mathias Vermeulen, Daniel Deering and Sadhbh McCarthy define impact as the negative effect of a counter-terrorism measure on the protection of legally-enshrined rights.⁹ This reflects the fact that for law the referent (expanded on below) is law itself. Vermeulen et. al. draw a distinction between the direct and indirect impact of counter-terrorist measures, meaning the effect of the measure on the legal status of those upon whom it is applied (direct impact) and its effect beyond that (indirect impact).

From a legal perspective the relevant referent in an impact assessment is law itself, which can be understood in three different dimensions: the law as it applies to suspected terrorists directly affected by the measure, the law as it applies generally, and the Rule of Law in a more general and intangible sense.

As regards the first of these it is clear that counter-terrorist measures can have direct impacts on suspected terrorists by, for example, providing that they are to be subjected to a restrictive measure without what would normally be considered to be due process or an adversarial trial process. Here the legal status of the suspect—or the legal processes and protections to which he is normally entitled—are adjusted by the counter-terrorist measures in question.

In addition to this direct effect, counter-terrorist measures can have an additional indirect effect which arises from what Fenwick and Phillipson¹⁰ deem the ‘covert derogation’ from human rights norms and de Londras¹¹ terms a general ‘downward calibration’ of legal protections. This reflects a general reduction in the level of rights protection *including* for those not suspected of involvement in counter-terrorism as a result of the counter-terrorist *malaise* which can result in courts and political actors accepting that security concerns require an adjustment in our ‘normal’ standards of legal protection. This normalisation and acceptance of exceptionalism impacts on societal levels of tolerance of diversity with the inevitable implications this has for minority communities. While the impact of counter-terrorist measures on the Rule of Law in general is difficult to measure, Kalliopi Koufa, a UN Special Rapporteur on Terrorism and Human Rights, has noted they can stimulate an atmosphere of ‘weakened resistance to overly harsh anti-terrorism measures’ and a ‘generalised racism and religious intolerance’ with broad politico-legal consequences.¹² The construction of a hierarchy of rights within a security context means that tolerance and acceptance of diversity can become overlooked as values, leaving minority groups in a precarious position.

As a general matter, it is accepted that counter-terrorism measures have legal impacts. This acceptance is manifested in existence (within both international and, in many cases, domestic law) of a legally defined period of emergency in which ‘normalcy’ is suspended in order for the state to take actions that would otherwise violate constitutional and/or human rights standards.¹³ The so-called ‘emergency/normalcy dichotomy’ has been criticised as both artificial and overly susceptible to manipulation,¹⁴ but its existence constitutes a recognition of the legal impacts of counter-terrorist measures and the attempt to quarantine those impacts to exceptional periods of time. Counter-terrorism measures can be introduced without such

⁹ Mathias Vermeulen, Daniel Deering & Sadhbh McCarthy (with research assistance from Carolin Möller), *Report on Legal Understandings of Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013) <<http://secile.eu/report-legal-understandings>>

¹⁰ Helen Fenwick and Gavin Phillipson (2011) ‘Covert derogations and judicial deference: redefining liberty and due process rights in counterterrorism law and beyond’, *McGill law journal*, 56 (4), pp. 863-918.

¹¹ Fiona de Londras (2011) *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge: Cambridge University Press).

¹² UN Sub-Commission on Human Rights, Progress report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur, E/CN.4/Sub.2/2001/31, p. 118.

¹³ Fionnuala Ni Aolain and Oren Gross (2006) *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press). See chapters 1 and 5.

¹⁴ Alan Greene (2011) ‘Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights’, *German Law Journal*, 12(10), pp.1764-1785.

an emergency being declared, and in those cases these measures are subjected to the more rigorous requirements of a period of formal ‘normalcy’ (albeit courts may afford discretion to the state taking the security-related surrounding circumstances into account). These measures also have broader impacts within the legal system, and in both cases the question asked by law is not whether there are any impacts at all, but whether those impacts are permissible. In other words, a legal (and particularly a juridical) consideration of these impacts will ask whether they are within what the law regards to be acceptable levels of interference with the *status quo ante* as measured by legal doctrines such as proportionality, the margin of appreciation and so on.

Measuring the legal impacts of counter-terrorism can take place in a number of ways, both legal and political in nature. A primary mechanism of carrying out such measurement is through legal challenges. At European level this can take place in both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). In their report, Vermeulen et. al. primarily consider the ECtHR and its extensive jurisprudence on counter-terrorist measures. They find that the Court focuses on the direct—rather than indirect—impacts of impugned measures on the procedural dimension of a human right; in other words, the Court asks whether the measure in question (a) infringes upon a protected right, and (b) is accompanied by sufficient safeguards to make that infringements proportionate, bearing in mind the significant margin of appreciation enjoyed by states in the field of security.

The CJEU takes a similar approach in its jurisprudence on counter-terrorist measures’ impact, tending to ask not whether these measures have a legal impact *per se* but rather whether their impact is unconstitutional. In this respect, the Court assesses both the direct impact and the compatibility of the measures with the fundamental principles of the European Union as demonstrated in *Kadi*.¹⁵ In this respect one might observe an important difference between the ECtHR and CJEU relating to the impacts of EU counter-terrorist measures; the ECtHR is a subsidiary international court assessing the compatibility of national measures (including those giving effect to EU law) with the Convention, whereas the CJEU is a constitutional court for the European Union assessing the compatibility of the Union’s own counter-terrorist activity with the Treaty of the European Union.

Domestic courts can also play an important role in assessing the legal impacts of counter-terrorist measures, including those implementing European Union counter-terrorism law. In their case study on the Data Retention Directive as part of Work Package 2, for example, Hayes and Jones provide eight different examples of legal actions arising from the adoption and transposition of the Data Retention Directive.¹⁶ Challenges focus on the impact of the measure on freedom of movement, the right to private and family life, secrecy of correspondence and freedom of expression with domestic courts commenting on technical

¹⁵ *Kadi*, appealed from Case T-306/01 *Yusuf and Al Barakaat* [2005] ECR II-3533 and Case T-315/01 *Kadi* [2005] ECR 11-3649.

¹⁶ Ireland: Judgment of the Court (Grand Chamber), *Ireland v Parliament and Council*, C-301/06, 10 February 2009, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5ef438a96eaae4a758e64c4539c3fa658.e34KaxiLc3eQc40LaxqMbN4OahmTe0?text=&docid=72843&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=615870>; Bulgaria: <http://edri.org/edri-gramnumber6-24bulgarian-administrative-case-data-retention/>; Hungary: ‘Constitutional Complaint Filed by HCLU Against Hungarian Telecom Data Regulations’, Hungarian Civil Liberties Union, 2 June 2008, <http://tasz.hu/en/data-protection/constitutional-complaint-filed-hclu-against-hungarian-telecom-data-retention/>; Romania: Constitutional Court of Romania, Decision no.1258, 9 October 2009, http://www.legi-internet.ro/fileadmin/editor_folder/pdf/decision-constitutional-court-romania-data-retention.pdf; Cyprus: Cyprus Supreme Court (Civil applications 65/2009, 78/2009, 82/2009 and 15/2010-22/2010), [http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/5B67A764B86AA78EC225782F004F6D28/\\$file/65-09.pdf](http://www.supremecourt.gov.cy/Judicial/SC.nsf/All/5B67A764B86AA78EC225782F004F6D28/$file/65-09.pdf); Germany: ‘Leitsätze zum Urteil des Ersten Seants vom 2. März 2010 – 1 BvR 256/08 – 1 BvR 263/08 – 1 BvR 586/08’, Bundesverfassungsgericht, 2 March 2010, https://www.bundesverfassungsgericht.de/entscheidungen/rs20100302_1bvr025608.html; see also ‘German Federal Constitutional Court Rejects Data Retention Law’, EDRI-gram, 10 March 2010, <http://www.edri.org/edri-gram/number8.5/german-decision-data-retention-unconstitutional/>; Czech Republic: ‘The English translation of the Czech Constitutional Court decision on Data Retention’, 22 March 2011, http://www.slidilove.cz/sites/default/files/dataretention_judgment_constitutionalcourt_czechrepublic.pdf; Slovakia: It is expected that a judgment will be delivered by the end of 2014 at the latest. See ‘Slovakian data retention law faces challenge before Constitutional Court’, Statewatch News Online, October 2012, <http://database.statewatch.org/article.asp?aid=31892>; Sweden: Judgment of the Court (Sixth Chamber) of 4 February 2010 – European Commission v Kingdom of Sweden (Case C-185/09), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:080:0006:0006:EN:PDF>

compliance including the proportionality of the measure without making a ruling on the actual Directive itself.

Courts are, however, limited in their capacity to undertake what Davis and de Londras have termed ‘counter-terrorist judicial review’¹⁷ by both their institutional limitations (as legal rather than political bodies) and the nature of legal disputes they determine, which tend to be fact-oriented and focused on one specific element of a broader counter-terrorist *milieu*. This focus means that courts do not generally take the broader counter-terrorist picture into account in making their decisions. However, Courts are not the only entities that engage in measurement of the legal impact of counter-terrorism. This also takes place in *quasi* political contexts such as parliamentary select committees (like the Joint Committee on Human Rights in the United Kingdom), in EU committees (such as the LIBE Committee), in other international organisations (such as the Council of Europe and the United Nations), and through the work of commissions of enquiry, tribunals and independent or statutory bodies (such as human rights commissions or the UK’s Independent Reviewer of Terrorism Legislation). Such entities are not generally bound by the same limitations as courts and can—depending on their terms of reference—take a more global view of the impact of a counter-terrorist measure, particularly in terms of indirect effect and effects on the Rule of Law.¹⁸

2.3 Democratic Impact

In her report on the democratic perspective, Yulia Chistyakova considers that the impact of counter-terrorism can be understood as its effect on democracy, understood as the democratic principles of the relevant political system, governance practice and the demos.¹⁹ Importantly, an appreciation of the democratic impact of counter-terrorism does not require an analysis of the quality of the pre-existing political system; rather it can assess impact against the *status quo ante* without any such assessment. In addition, the report makes it clear that the nature of counter-terrorism does not make it *a priori* immune from democratic control; it is possible to imagine democratic oversight and control of counter-terrorism so that a democratic system of security might be designed and implemented.

Drawing from the general concept outlined above, it is clear that the democratic perspective conceptualises impact across three referents: the relevant political system, practices of governance, and the demos itself.

In the case of EU counter-terrorism, the relevant political system is the European Union itself. The EU’s democratic principles are those identified in the Treaty of the European Union, namely the indivisible, universal values of human dignity, freedom, equality and solidarity based on the principles of democracy and the rule of law.²⁰ The report makes it clear that understanding impact by reference to democratic principles requires an assessment of *both* the impact of the measures in question on the maintenance of these principles *and* the impact of a climate of counter-terrorism on our understanding of the content of and a commitment to these principles. In this respect, it must be recalled that recourse to the exceptionalism debate and the prioritisation of security over liberty can lead to a reframing of democracy and radical adjustment in our understanding of its core content.

As well as impacting on our understanding of and adherence to core democratic principles, a further impact of counter-terrorism from the democratic perspective can manifest itself in governance practices. These include the practice by which measures are introduced, debated, justified and assessed. As noted by

¹⁷ Fergal Davis & Fiona de Londras, ‘Counter-Terrorist Judicial Review: Beyond Dichotomies’ in F. Davis & F. de Londras (eds), (2014) *Critical Debates on Counter-Terrorist Judicial Review* (Cambridge; Cambridge University Press), forthcoming.

¹⁸ See for example Kent Roach, ‘Public Inquiries as an Attempt to Fill Accountability Gaps Left by Judicial and Legislative Review’ and Jessie Blackbourn, ‘Independent Reviewers as Alternative: An Empirical Study from Australia and the UK’ both in F. Davis & F. de Londras (eds), (2014) *Critical Debates on Counter-Terrorist Judicial Review* (Cambridge; Cambridge University Press), forthcoming.

¹⁹ Yulia Chistyakova, *Report on Democratic Understandings of Impact, Legitimacy and Effectiveness in the Counter-Terrorism Context* (SECILE Consortium, 2013) <<http://secile.eu/democratic-perspectives>>

²⁰ Article 6(1) of the TEU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000. The preamble states that ‘the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law’.

Sjursen,²¹ and cited in the report,²² the extensive use of flexibility mechanisms and the employment of secrecy and urgency procedures associated with the adoption of CT measures tend to create greater distance, or ‘remove’ policies and processes from citizens’ influence. As a result, decision-making becomes less transparent and accountable and the link between the measures and democratic authorisation less tangible. As has been outlined by Hayes and Jones in their *Report on how the EU assesses the impact, legitimacy and effectiveness of its counter-terrorism laws*, there has indeed been a striking lack of democratic participation in the field of counter-terrorism at EU level since 2001.²³

The third referent from a democratic perspective is impact on the demos itself, particularly in relation to the restrictions on civil liberties and human rights and the uneven distribution of those restrictions across societal groups and, indeed, civil society organisations. In this respect, the democratic perspective and societal perspective share a clear concern with understanding the effect of measures across societal groups as well as on societal values, including democratic principles.

As with societal impact, measuring democratic impact is a complex matter and requires an understanding of counter-terrorism’s effects across principle, practice and people.

2.4 Operational Impact

In their report on the operational perspective, de Londras, Doody and Downing argue that impact might be understood as the effect that operationalisation of counter-terrorist measures (understood as a process by which abstract or imprecise commitments, principles, measures and policies are translated into ‘on the ground’ action) has on the operational framework.²⁴ In each of these areas EU counter-terrorism may have both national and transnational impacts, and these impacts can be uneven, positive or negative.

From an operational perspective, the impact of EU counter-terrorism may be national or transnational. In both respects, impact might be understood as the effect that operationalisation has on the operational framework (for example, does it create new institutions or practices within the broader framework of operation of the national authority itself), on roles (for example, does it necessitate the creation of new roles or offices at national level), and on resources (such as training needs and other compliance costs). At a national level the *impact* of operationalisation for the operationalising institution may, then, be empirically measurable inasmuch as a cost (in terms of time, personnel and resources) may be calculable. Operationalisation can also create impact at the European level, which might again be understood in terms of operational frameworks, roles and resources. The operationalisation of EU counter-terrorism law and policy may require leadership from one of more EU agencies and lead to the creation of new institutions or offices. It may also bring about either harmonisation or fragmentation of frameworks and systems used for particular purposes within the EU.

2.5 Impact: Key Cross-Disciplinary Observations

- Impact relates to the effect or consequence a counter terrorism measure has.
- Impact must be understood in relation to relevant referents.
- Impact can be positive or negative; the same measure can have both positive and negative impacts across different referents.
- Impact can be direct or indirect.
- Impact can be temporally-variable, changing in extent and nature depending on context (e.g. whether in a period of emergency or normalcy).

²¹ Helene Sjursen (2011) ‘Not so intergovernmental after all? On democracy and integration in European Foreign and Security Policy’, *Journal of European Public Policy*, 18(8), pp. 1078-1095.

²² Yulia Chistyakova, *supra* note 19, p. 21.

²³ Ben Hayes and Chris Jones, *supra* note 1.

²⁴ Fiona de Londras, Josephine Doody & Lt. Cdr. Erika Downing, *Report on Operational Perspectives on Impact, Legitimacy and Effectiveness in Counter-Terrorism* (SECILE Consortium, 2013) <<http://secile.eu/report-on-operational-perspectives>>

- In order for impact to be comprehensively understood, direct and indirect impacts should be measured against multiple referents, which in turn should include societal groups, institutions, societal values and principles (such as democratic principles and the Rule of Law).
- The question of *who measures* impact is important. Institutional design may mean that some entities—such as courts—are capable only of examining impact to a limited extent, while others—such as politico-legal reviewers or parliamentary bodies—may have broader impact analysis capacity.

3. Effectiveness

In general terms, we can understand effectiveness as ‘The quality of being effective’ where effect is defined as ‘concerned with, or having the function of, carrying into effect, executing, or accomplishing’.²⁵ ‘This suggests that in order to measure or understand effectiveness we must be aware of what the desired result of a measure was, i.e. of what its objective was. Across the four different perspectives—societal, legal, democratic and operational—we can observe differing approaches to measuring effectiveness, as well as to understanding what it means to produce a desired result in the counter-terrorist context.

3.1 Societal Effectiveness

Martin-Mazé defines effectiveness by reference to the extent to which a measure’s results align with those that were expected.²⁶ Effectiveness is determined by whether the measures ‘actually make a difference’,²⁷ and from a societal perspective a measure’s effectiveness can be positive or negative (i.e. a measure can be counter-productive).

The societal report reflects on how difficult it can be to actually determine the effectiveness of a counter-terrorism measure as the security complex responsible for the development and design of security measures and modalities tends to monopolise the information required to make such an assessment. *Ex post facto* evaluations thus tend to focus on outputs rather than on impact *per se* so that the so-called effectiveness analysis risks excluding key societal indicators.

Furthermore, societal representations of the effectiveness of counter-terrorist measures are heavily influenced by three key arguments, prominent in politico-legal discourse: the exception argument, the metaphor of a balance between security and liberty, and the trade-off model. These arguments frame societal perceptions of effectiveness and thus present a further challenge to rigorous analysis.

The societal approach proposes a move to analysing effectiveness across an output-outcome-impact trichotomy. According to this, output-effectiveness ‘investigates the features characteristic of a given counter-terrorist framework’.²⁸ The adoption of a measure in response to a threat would be considered an output. Outcome-effectiveness ‘brings under examination the compatibility of that which is delivered by the policy framework with the provisions that are built into its design’.²⁹ Finally, impact-effectiveness ‘tackles this issue pertaining to the behaviour of the targeted audience’.³⁰

3.2 Legal Effectiveness

As outlined by Vermeulen et. al. in their report, effectiveness is not usually something that legal analyses take into particular account (in contradistinction to necessity, proportionality and legality). Rather, effectiveness might be understood in terms of the production of an intended result, such as expedition of the prosecution of suspected terrorists or the freezing of suspected terrorists’ assets. Although, as outlined in detail in the report, the ECtHR does not usually expressly assess the effectiveness of impugned counter-terrorist measures, it does consider whether a measure is ‘necessary in a democratic society’ and/or limited to that which is ‘strictly required by the exigencies of the situation’; an assessment that might implicitly take effectiveness into account. However, as the report outlines in some detail, the ECtHR tends to take a quite deferential approach (in respect of both national courts and national governments) in cases relating to counter-terrorism. As might be expected of a subsidiary international court the ECtHR rarely discusses the effectiveness of a given counter-terrorism measure, nor does it take measures of effectiveness explicitly into account to determine the legality, necessity or proportionality of a counterterrorism measure. The Court of Justice of the European Union may take a somewhat different approach in future litigation, but a recent Advocate General opinion appears similar. In his opinion on the Data Retention Directive, Advocate General Cruz Villalón reflects on the concept of impact, or an understanding of it.

²⁵ *Oxford English Dictionary* (2nd edn, 1991) vol. V, p. 80.

²⁶ Méderic Martin- Mazé, *supra* note 4, p. 5.

²⁷ *Ibid*, p. 22.

²⁸ Méderic Martin- Mazé, *supra* note 4, p.24.

²⁹ *Ibid*.

³⁰ *Ibid*.

He seeks to understand access to and use of data in order to develop a profile of interference. This judgment on interference then contributes to his consideration of issues of proportionality, necessity and the validity of the measure.³¹

In at least some jurisdictions, national courts do make explicit or implicit reference to the effectiveness of measures in the course of their legal analysis. The following example from the Republic of Latvia demonstrates this well.

Case study: the Supreme Court of Latvia:

In 2006 EU member states' national immigration laws supplemented by Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). This Regulation allowed states to make a list of non-residents who are not permitted to enter their territories. In the Republic of Latvia, domestic legal provision to list such individuals is included in the Law on Immigration of the Republic of Latvia, which allows those listed to appeal the decision to the Department of Administrative Cases of the Supreme Court of Latvia.

In deciding on such an appeal, the Department of Administrative Cases of the Supreme Court of the Republic of Latvia asks for information from national authorities. In one case, information was sought from the Security Police. Within in the period specified by the Court, the Chief of the Security Police sent a four-page report outlining the reasons why the appellant had been prohibited from entering Latvia. The report outlined relevant events, but did not provide concrete evidence in the form of original documents. Having read the report, the Judge concluded that grounding information had been gathered during criminal intelligence activities, which appropriately established the appellant's movements and was contained in a dossier classified as 'State Secret'.

Documents classified as 'State Secret' may not be shown, disseminated or published in any way. The Law of the Republic of Latvia On State Secrets allows for actions to be taken on the basis of information that is so classified, but concrete warning procedures with all consequential penalties are in place for the persons involved (such persons who have seen the contents of classified documents). Only a limited group of persons are allowed to access these documents, but the person who has been under criminal intelligence activities is not included in this group. Thus, the appellant in this case could not access the dossier containing the grounding information for exclusion from Latvia.

The procedural laws on court proceedings state that, if a document is reviewed during a court hearing, all the persons included in the court case may access it, including the complainant and his attorney. Thus, in this case—where the documents could not be revealed under the State Secret law—there was a conflict between that law and the general legal principles of disclosure, which have legal effect and which were also codified (subsequent to state secrets) by Parliament. The Judge asked the Security Police to bring to the next court hearing all the documents (including documents classified as State Secret) which were mentioned in the letter from the Chief of the Security Police and were said to prove the basis for excluding the appellant. The Judge took into account that in Latvian law general legal principles enjoy superiority over contrary legislative provisions. From the theoretical point of view, a separate legal provision lapses if it is contrary to the general principles.

Hearing this case, the Judge of the Supreme Court took into account the Administrative Procedure Law of the Republic of Latvia, Section 1, Part 4 of which says that norms of law are comprised of regulatory enactments (parts thereof) and general principles of law. The responsibility of the Judge is to take into

³¹ Case C-293/12 *Digital Rights Ireland Ltd. v The Minister for Communications, Marine and Natural Resources; The Minister for Justice, Equality and Law Reform; The Commissioner of the Garda Síochána Ireland and The Attorney General* and Case C-594/12 *Kärntner Landesregierung, Michael Seitlinger and Christof Tschohl*, [2013] request for a preliminary ruling from High Court of Ireland, Opinion of AG Cruz Villalón.

account all sources of law which are necessary for him/her to justify and argue the decision arrived at. One of the general legal principles of law – the principle of legitimacy – in the definition of ‘law’ includes not only normative acts, but also international customary law, case-law and general legal principles.

In this specific case the written legal provisions (laws) did not immediately resolve the situation; none of the legal provisions could be applied directly to the circumstances of the case). Thus, the Judge had to look for a logical and objective answer that would provide unity, coherence and order in the legal system at another normative level: general legal principles (Taking into account that Latvia is a country where written Legal Acts (laws) are the primary source of law, the judge can also identify, define and use general legal principles).

In this specific case, hearing a complaint of the person who was included in the ‘List of those foreigners for whom entry in the Republic of Latvia is Prohibited’, the Judge of the Supreme Court, applied general legal principles (and not only norms from Legal Acts (laws)) in order to defend human rights. As a result, the representatives of the appellant (attorneys) in the case were entitled to see the documents that formed the basis of the decision to prohibit the entry of the appellant to Latvia.

With the decision in this specific court case, the Judge constituted case-law for such cases where documents classified as State Secret are used as evidence. In accordance with the source of law theory (which says that case-law is also a source of law) the legal system was supplemented without the help of the Parliament (legislation process), based on general legal principles only, and a signal was sent to the Parliament that the laws that determine the circulation of state secret objects should be improved taking individual rights into account (which will be done in 2014).

As noted above, legal analyses in the field of counter-terrorism can be and are undertaken by extra-judicial bodies as well as by courts. In such situations effectiveness can be a more substantial part of the analysis than when courts are arbitrating on a set of factual situations. As outlined above, unlike courts such politico-legal processes (such as parliamentary committees, enquiries, special procedures of the UN etc.) are not usually bound by the same institutional concerns as national and international courts, so that they can undertake broader analyses than can courts.³²

3.3 Democratic Effectiveness

From a democratic perspective, effectiveness is also connected with the extent to which measures achieve their intended effects. Thus, Chistyakova notes that effectiveness is closely connected with output legitimacy, inasmuch as that which is seen to be ‘working’ is perceived as having enhanced legitimacy. However, effectiveness is problematic as a concept within EU counter-terrorism from a democratic perspective for a number of reasons.

Firstly, the effective measurement of counter-terrorist measures’ effectiveness is frustrated by a lack of information sharing within and across the EU inasmuch as European agencies are heavily reliant on information and capacities that remain largely within the domestic domain of member states.

Secondly, EU counter-terrorism measures can have what Schneider et. al. term ‘second-order’ effects that are often overlooked.³³ For example, CT efforts might divert public spending away from other activities, including security-oriented ones, or result in changed foreign policy priorities or practices. Where these second-order effects are overlooked it is difficult to tell whether counter-terrorism measures are actually effective. It is not clear whether the measures achieve their aims or whether they have perhaps led to transference or substitution effects.

³² See for example the reports of the UK’s Independent Reviewer of Terrorism Legislation, which are prepared following consultation with relevant actors—including operational actors and civil society—and of relevant files (the reviewer has appropriate security clearance). All reports are published on the Reviewer’s website: <https://terrorismlegislationreviewer.independent.gov.uk/>

³³ Friedrich Schneider, Tilman Brück and Daniel Meierrieks, (2010) ‘The Economics of Terrorism and Counter-Terrorism: A Survey (Part II)’, *CESifo Working Paper Series No 3012* < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590148>.

3.4 Operational Effectiveness

From an operational perspective effectiveness appears to be connected with the extent to which the objective that was to be achieved by means of introducing the measure or policy has actually been achieved. Effectiveness here seems, thus, to be a non-abstract matter; rather it is measurable. However, this requires that a clear rationale for the measure or policy in question ought to have been outlined; one the satisfaction of which can in fact be assessed in a meaningful way. In addition, it requires there to be a way of measuring this effectiveness, most likely by means of a monitoring mechanism. As outlined by Hayes and Jones in their *Report on How the EU Assesses the Impact, Legitimacy and Effectiveness of its Counter-Terrorism Laws* EU counter-terrorist measures frequently lack built-in monitoring mechanisms and, where they do exist, these mechanisms are not always in fact given effect.³⁴

Monitoring effectiveness from an operational perspective can happen at the level and instigation of the operationalising entities, or be structured into new institutions and frameworks that might be created in the course of operationalisation, and there is the potential for these to provide a discrete picture of whether the measure of policy is achieving its original objective at that level but will not necessarily provide an overview of effectiveness at the EU-level. Thus, from an operational perspective effectiveness might be understood as the satisfaction at operational level(s) of the original objectives that were to be achieved by the introduction of the EU policy or measure.

3.5 Effectiveness: Key Cross-Disciplinary Observations

- Across all surveyed fields effectiveness relates broadly to the extent to which a measure achieves its intended outcomes
- Assessing and understanding effectiveness requires clear identification of a measure's intended outcomes
- Measuring or assessing effectiveness from societal, legal and democratic perspectives poses particular challenges because of information deficits and/or monopolisation, a failure to take second order effects into account, the conflation of compliance with effectiveness within official monitoring mechanisms, and institutional limitations
- effectiveness may be more susceptible to measurement from an operational perspective where the intended outcomes are clearly defined
- Operationally, effectiveness relates to the extent to which an objective has actually been achieved and is measurable through monitoring mechanisms.
- There is a clear connection between effectiveness and outcome legitimacy, inasmuch as measures that are seen to be effective are likely to be perceived as having enhanced legitimacy from an outcome perspective

³⁴ Ben Hayes and Chris Jones, *supra* note 1.

4. Legitimacy

As a concept, legitimacy is closely associated with—but not synonymous to—legality, inasmuch as that which is lawful may enjoy a presumption of legitimacy.³⁵ Across the four different reports the complexity of the concept of legitimacy and its close connection to both the concepts of impact and effectiveness becomes clear to the extent that it may be difficult to conceptualise legitimacy as an autonomous concept from impact and effectiveness.

4.1 Societal Legitimacy

Martin-Mazé argues that the concepts of legitimacy and effectiveness are difficult to disentangle from a societal perspective. This is because of the strong relationship between (perceived) effectiveness and (perceived) legitimacy. From a societal perspective, the focus is on the concept of effective legitimacy explained within this report as ‘a bi-faceted concept, where the input of procedural validation meets the output of effective results’ (measured by a results-based evaluation)³⁶. In other words, a measure developed through an acceptable policy-making process that achieves results is legitimized. It has gained effective legitimacy. Thus, from a societal perspective legitimacy as a concept is heavily dependent on effectiveness as (alleged or perceived) effectiveness is a key mechanism for legitimation; the more effective a measure is said to be the more legitimate it may be perceived as being.

As noted above, within the societal perspective arguments as to exceptionalism, the possibility of balancing security and liberty, and the necessity of a trade-off between security and liberty are all key elements in political assessments of effectiveness, so that effectiveness itself is a problematic concept. That, in turn, is challenging from the perspective of legitimacy given its societal relationship to effectiveness.

4.2 Legal Legitimacy

In the legal report, Vermeulen et. al. outline two general concepts of legitimacy: descriptive legitimacy and normative legitimacy. Descriptive legitimacy refers to ‘people's beliefs about political authority and, sometimes, political obligations’. The normative concept of legitimacy refers to ‘some benchmark of acceptability or justification of political power or authority and – possibly – obligation’.³⁷ From this a distinction between lawfulness and legitimacy can be drawn, recognising that a measure might be lawful but considered illegitimate. The report draws on work by de Londras, who identifies four factors that can determine the legitimacy of a counter-terrorism measure: the existence of a public justificatory deliberation, non-discrimination, meaningful review, and temporal limitation of a given measure.³⁸ They then look at how counter terrorism laws have tried to incorporate these factors within the law with a particular focus on the use of sunset clauses in counter-terrorism, which Finn claims (ideally) have deliberative,³⁹ informational⁴⁰ and distributive benefits.⁴¹

While courts are not involved directly in assessing the legitimacy (as opposed to the legality) of counter-terrorist measures, matters such as temporal limitation can be taken into account in proportionality analyses at both national and international court level, so that these kinds of matters might be subjected to what is effectively an indirect review by courts. Such matters can also be taken into account in extra-judicial mechanisms such as independent and/or statutory review, and parliamentary processes.

³⁵ This is reflected in the Oxford Dictionary definition of legitimacy as ‘conformity to rule or principle’ *Oxford English Dictionary* (2nd edn, 1991) vol. VIII, p. 811.

³⁶ Méderic Martin- Mazé, supra note 4, p.7.

³⁷ *Stanford Encyclopedia of Philosophy*, ‘political legitimacy’: <http://plato.stanford.edu/entries/legitimacy/>

³⁸ Fiona de Londras (2011) ‘Can counter-terrorist internment ever be legitimate?’, *Human Rights Quarterly*, 33 (3), pp. 593-619.

³⁹ Defined as ‘elements or characteristics that improve second stage legislative decision-making by improving the quality and functioning of the deliberative process’ John Finn (2009) ‘Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation’, *Columbia Journal Of Transnational Law*, (48), p. 448.

⁴⁰ Ibid, p.448: ‘sunset clauses allow [us] to collect more information about the issue before making it permanent’.

⁴¹ Ibid, p.449: ‘sunset clauses may advantage the legislature “relative to the executive,” as well as allocate agenda control between current and future-time legislatures’.

4.3 Democratic Legitimacy

In her report on the democratic perspective, Chistyakova distinguishes between output and input legitimacy, consisting of the effective protection of EU citizens against terrorism, on the one hand, and the equal participation of citizens in the legislative decision-making process on the other.

Output legitimacy here is Hobbesian in its perspective, considering a state's security measures to be legitimate when they can be seen to be effective in providing individual and collective security. Input legitimacy, more liberal in its approach, relates to procedural criteria or requirements for determining the popular will, including majoritarianism, citizen representation and the representation of interest groups and networks. A third criterion of democratic legitimacy advocated by Schmidt⁴² is 'throughput' legitimacy judged in terms of the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation with the people. Output and input legitimacy can be in tension, with some arguing that EU level democratic values are traded for effectiveness in policy making⁴³, and others that 'the EU today lacks efficient performance rather than legitimate process. In other words, between the EU's demos and its kratos, the latter is more of a problem than the former'.⁴⁴

Chistyakova considers the impact of the Lisbon Treaty on the democratic legitimacy of counter-terrorism law. The Lisbon Treaty has introduced a number of changes to the EU's Area of Freedom, Security and Justice (AFSJ) policy landscape with potentially significant implications for democratic legitimacy of CT measures. Of particular relevance are increased powers of the European Parliament (the co-decision power) and the jurisdiction of the CJEU to review and interpret AFSJ law and actions.

4.4 Operational Legitimacy

In their report, de Londras et. al. note that operational perspectives on legitimacy may be connected to both process (or input) and output legitimacy. In terms of process legitimacy, the extent to which the creation of an EU counter-terrorist law or policy that must then be operationalised has been generated in appreciation of an existing need—as opposed to as a political matter—is likely to be taken into account when its legitimacy is being assessed by an operationalising entity. This is at least partially because, where the policy is created for political rather than operational reasons, it is likely to be especially vague in its nature requiring substantial innovation and resource allocation by European and/or national authorities in order for operationalisation to take place. In other words, the degree to which the operationalising process of translation is onerous may be influenced by the process by which the measure or policy was generated. In contrast, regardless of the process by which the measure of policy was generated there is likely to be a concern with output legitimacy which, in turn, may address the workability of the measures required or obligations imposed. This is arguably connected to the extent to which the measure(s) answer general operational needs such as clarity of obligation, non-duplication, incentivisation of cooperation and coordination, and information sharing, which in turn may be enhanced by ensuring the participation of operational actors in the process of generating the measure/policy/output in the first place.

Thus, legitimacy might be understood as referring to the workability of the measure/policy/obligation when seen from the perspective of the entity or entities required to operationalise it, where the extent to which operational needs are addressed is taken into account.

4.5 Legitimacy: Key Cross-Disciplinary Observations

- Legitimacy is a nebulous term that can be said to comprise of numerous different strands including input legitimacy, process legitimacy, output legitimacy, outcome legitimacy, effective legitimacy, descriptive legitimacy and normative legitimacy

⁴² Vivien Schmidt (2013), 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' *Political Studies* 61(1), pp 2-22.

⁴³ B. Kohler-Koch and B. Rittberger (eds) (2007) *Debating the Democratic Legitimacy of the European Union* (Lanham: Rowman and Littlefield).

⁴⁴ Tomassa Padoa-Schioppa, 'Conclusion' in R. Matarazzo (ed), (2011) *Democracy in the EU after the Lisbon Treaty* (Rome: Istituto Affari Internazionali).

- There is a close relationship between effectiveness and legitimacy in the counter-terrorist context, as measures that are perceived as effective are likely to enjoy enhanced legitimacy.
- Processes of legitimation in the counter-terrorist context can include the deployment of narratives such as those of exceptionalism, balance and trade-off.
- Procedural and substantive mechanisms—such as sunset clauses—may be employed in an attempt to enhance legitimacy, including in politico-legal processes.
- Given their close relationship, the challenges outlined above that arise in measuring effectiveness are likely to have knock-on implications for legitimacy assessment.

5. Conclusions: The Relationship between Impact, Legitimacy and Effectiveness

Impact, legitimacy and effectiveness are related concepts in the context of EU counter-terrorism.

There would appear to be a clear relationship between impact and legitimacy. As noted in the societal report, counter-terrorism measures can have both negative and positive societal impacts that are felt unevenly. This relates to the fact that, from a legal perspective, we can conceive of direct and indirect impacts, and the reality that different operationalising entities and people might be impacted differently by counter-terrorism measures. The fact that impacts are uneven and not inevitably positive suggests that input or process legitimacy is particularly important. Not only might more participatory and transparent processes of developing counter-terrorism measures result in possible impacts being more comprehensively appreciated and considered *ex ante* but it may also mitigate the uneven distribution of negative impacts in a way that, consequently, improve the perceived legitimacy of the outcome. It is also important to recall that perceived legitimacy may vary across different societal groups and entities, so that, for example, an operationalising entity might find a counter-terrorist measure that increases its ease of operation to be more legitimate than does a civil society actor concerned with the maintenance of 'normal' procedural requirements. It is, thus, important that impact and legitimacy would be assessed across a number of different referents in order to try to generate a cross-sectional perspective on the impact and legitimacy of counter-terrorist measures.

The relationship between impact and effectiveness might be understood across two dimensions. Firstly, counter-terrorism measures that impact negatively on societal and legal values (such as the Rule of Law or social cohesion) and cause adjustments in either governance practices or our understandings of core democratic principles and tenets may have serious long-term impacts in terms of *demos* that ultimately have counter-productive (or negative) effects from a security perspective. Furthermore, counter-terrorism measures that place overly onerous or unachievable burdens on operationalising entities, or that are so vague as to offer little guidance to these entities, may suffer from ineffectiveness not only through non-compliance or a failure to 'buy in' to processes but also because the resource impacts of effective operationalisation are such as to undermine security more broadly. This echoes the point, made in the democratic report, about 'second order effects' of counter-terrorism which might be felt not only in governance structures at national and supranational political level but also throughout operational structures, institutions and processes.

The relationship between legitimacy and effectiveness is a particularly complex one. Measures that are perceived or represented as being more effective are likely to also be perceived as being more legitimate, subject to the caveat as to differentiated levels of perceived legitimacy across different societal groups and institutional actors. The implications for perceived legitimacy of measures and their acceptability among the *demos* that flow from representations of effectiveness serve to highlight the importance of tackling the challenges of measuring effectiveness that were considered above. In particular, processes that purport to assess effectiveness while in fact measuring only levels of compliance and/or relying on information that is generated by and exclusive to operationalising entities must be effectively problematised in order for a more comprehensive view of a measure's effectiveness to be generated that can then accurately inform debates as to legitimacy in both popular, legal and democratic fora.